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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 213

W. T. GRANT COMPANY,
Petitioner,

versus

MRS. LILLIAN M. SKELTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Fifth Circuit.

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IN THE

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OCTOBER TERM, 1964.

No. .....

W. T. GRANT COMPANY,
Petitioner,

versus

MRS. LILLIAN M. SKELTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

W. T. Grant Company, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on April 14, 1964.

OPINIONS BELOW.

The opinions of the District Court, in reality an order dismissing respondent's complaint (R. 21) and an order denying respondent's motion to reconsider (R. 26), have not been reported. Copies are appended as Appendix I.

The opinion of the Court of Appeals (R. 37) has not been reported. A copy is appended as Appendix II.

JURISDICTION.

The judgment of the Court of Appeals was entered April 14, 1964. A petition for rehearing (R. 44) was denied on May 28, 1964.

Jurisdiction to issue the writ is invoked pursuant to the provisions of Title 28, Section 1254 (1), United States Code.

QUESTIONS PRESENTED.

I. Whether, in its opinion reversing the decision of the District Court dismissing respondent's complaint, the Fifth Circuit Court of Appeals contrary to the Rules of Decision Act, Title 28, Section 1652, United States Code, decided an important state question in a way in conflict with applicable Georgia Law.

> Petitioner was the employer of respondent and the complaint sought recovery of damages for an alleged common-law tort committed during existence of the employment. Under The Georgia Workmen's Compensation Act, by its express terminology and as applied by Georgia Courts, the employer can not be a common-law tort-feasor as to the employee. The Fifth Circuit decision holds exactly the opposite.

II. Whether, in its opinion reversing the decision of the District Court dismissing respondent's complain the Fifth Circuit Court of Appeals has overturned a decision of the District Court which has achieved a clearly permissible result in the application of Georgia law contrary to well established principles of Federal Jurisprudence as evidenced by decisions of this Court, its own decisions in other cases, and decisions of other Circuit Courts of Appeals in similar situations.

STATUTES INVOLVED.

The only United States statute involved is **Title 28, Section 1652, United States Code,** which provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision of civil actions in the courts of the United States, in cases where they apply."

The applicable Georgia statutes comprise two sections of its Workmen's Compensation Act, viz:

Georgia Code Section, 114-102:

> "'Injury' and 'personal injury' defined.—'Injury' and 'personal injury' shall mean only injury by accident arising out of and in the course of the employment and shall not include a disease in any form except where it results naturally and unavoidably from the accident, nor shall 'injury' and 'personal injury' include injury caused by the wilful act of a third person directed against an employee for reasons personal to such employee (Acts 1920, p. 167; 1922, pp. 185, 186)."

Georgia Code Section 114-103:

> "Other remedies excluded by this law.—The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this Title, agreeing respectively to accept and pay compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death (Acts 1920, p. 176)."

STATEMENT OF THE CASE.

This action originated in the Superior Court of DeKalb County, Georgia, and was removed by respondent to the United States District Court for the Northern District of Georgia, Atlanta Division, upon the ground of diversity of citizenship (R. 2). By her complaint respondent sought to recover of petitioner the sum of $50,000.00 alleging that prior to about 6:30 o'clock P. M. on June 5, 1963, she was employed by the petitioner for a period of several years, first as a sales clerk and finally as a clerical employee in the Credit Office at petitioners store located in Belvedere Plaza Shopping Center, being discharged by petitioner at about 6:30 o'clock P. M. on June 5, 1963.

At about 5:00 o'clock P. M. on June 5, 1963 she was summoned from the Credit Office to the office of the Manager, Mr. Claude Darroch, and when she reached his office she was told by him to "sit over there", whereupon he immediately closed the door, blocked it with a chair and sat in same. In the office was Mr. R. L. Sanders, Regional Credit Manager of petitioner, who took a chair next to Mr. Darroch, and Mrs. Mary Power, Credit Manager of the store, took a chair next to Mr. Sanders, thus completely enclosing respondent within the office with no means of exit.

The named persons accused petitioner of stealing some item involving some $28.00, presented her with a written confession previously prepared, demanded that she sign it, as a result of which she was restrained of her liberty for approximately an hour and a half, no warrant having been obtained for her arrest, and no law enforcement officers being present. The said charges were maliciously made in that petitioner's agents knew they had no proof to sustain same, yet continued repeatedly to make said

charges as a result of which respondent became extremely nervous, her feelings and sensibilities were wounded, and she was exposed to great mortification and embarrassment being not guilty of any theft of any property of any kind belonging to the petitioner. The complaint explicitly alleged that the said Darroch, Sanders, and Mrs. Power were servants and employees of petitioner acting in the scope of their employment as such.

After removal of the action petitioner filed in the United States District Court a motion to dismiss and in the alternative to strike (R. 15) for failure to state a claim upon which relief could be granted because

> (a) Under the law of Georgia petitioner was not liable to respondent for the acts alleged to have been committed by its employees; and
>
> (b) Respondent's right to maintain the action was foreclosed by the provisions of Georgia Code Section 114-103, hereinbefore quoted.

On August 22, 1963, the District Court entered an order (Appendix I) sustaining the motion to dismiss and thereafter on September 12, 1963, a further order (Appendix I) declining to reconsider the previous order sustaining the motion to dismiss.

Respondent appealed from the dismissal of the complaint (R. 32), and upon review the Fifth Circuit Court of Appeals reversed the judgment of dismissal and remanded the case for further proceedings not inconsistent with its opinion (Appendix II).

REASONS FOR GRANTING THE WRIT.

I.

By its decision in the instant case the Fifth Circuit Court of Appeals has decided an important state question in a way clearly in conflict with applicable Georgia law contrary to the Rules of Decision Act **(Title 28, Section 1652, United States Code)**, and thus ignored this Court's admonition in **Erie Railroad Company v. Tompkins**, 304 U. S. 64, and **Guaranty Trust Co. v. York**, 326 U. S. 99.

The Circuit Court stated three premises in reaching its conclusion that respondent's complaint was incorrectly dismissed, viz:

> (1) An employee in Georgia, notwithstanding provisions of the Workmen's Compensation Act, may sue the employer in a common-law action for "injury caused by the wilful act of a third person"; and
>
> (2) The Georgia Workmen's Compensation Act does not deprive an employee of any common-law right to sue his employer "unless the action which he seeks to assert is one for an injury as to which relief has actually been granted under the Compensation laws;" and
>
> (3) Respondent was entitled to sue unless the conduct complained of "would be **compensable** under the Workmen's Compensation Act of the State of Georgia."

Neither of these premises is sustainable. On the contrary, the Georgia holdings are exactly the opposite.

(1)

Georgia Law Does Not Subject Employer to Suit by Employee for Wilful Act of Third Person.

From the Fifth Circuit opinion the following language is quoted:

> "Moreover, in the absence of any Georgia authority to the contrary, we conclude that this alleged conduct was 'injury caused by the wilful act of a third person' ".

Paragraph twenty-two (22) of the complaint (R. 10) alleged the named individuals were at the time servants and employees of petitioner acting in the scope of their employment as such, but even if these individuals had been third persons acting wilfully Georgia law would still not subject petitioner to suit by respondent in a common-law action.

In **Employer's Insurance Company of Alabama v. Wright,** 108 Ga. App. 389, 133 S. E. 2d 39, the Court of Appeals of Georgia held that **rape** of an employee at gun-point on the employer's premises is covered by the Georgia Workmen's Compensation Act. In the body of the opinion it is stated:

> "The fact that the injury sustained by the employee in this case was the result of a **wilful criminal assault** does not prevent the same from being an accidental injury within the purview of the Workmen's Compensation Law . . ." (Emphasis supplied.)

Certiorari was denied by the Georgia Supreme Court.

In an earlier holding, **Williams Bros. Lumber Co. v. Meisel,** 85 Ga. App. 72, 68 S. E. 2d 384, the Georgia Court of Appeals laid down the proposition that

> "Code Section 114-103 takes away from the employee any common-law right of action against the

employer for injuries to the employee due to the negligence of the employer, and the legal effect of this fact is to **eliminate completely the idea that the employer can be a common-law tort feasor as to the employee.**" (Emphasis supplied.)

(2)

Recovery of Benefits Not Critical Test.

Elsewhere in its opinion the Fifth Circuit Court of Appeals stated

> "**In the absence of any decision by the highest courts of the State of Georgia,** we cannot construe the Workmen's Compensation Acts of that state as being designed to deprive an employee of any common-law action which he might otherwise have against his employer, **unless the action which he seeks to assert is one for an injury as to which relief has actually been granted under the Compensation laws.**" (Emphasis supplied.)

The **actual** grant of relief under the Compensation laws, and the specific award and recovery of compensation by the employee is not, and has never been, the test applied by Georgia courts in denying employees the right to sue the employer in common-law actions.

As early as 1932 in **Webb v. Tubize-Chatillon Corporation,** 45 Ga. App. 744, 165 S. E. 775, it was held:

> "Where an employee has, as is provided in the workmen's compensation act, accepted the act, his rights against the employer to recover on account of any injuries sustained by reason of the employer's breach of **any duty to the employee, arising out of the relation between them,** which was that of master and servant, are determinable solely under the pro-

visions of the act, and, as expressly provided in the act, are not determinable at common law. **This is true notwithstanding the injuries complained of did not result from an accident, and therefore the employee, although he had accepted the act, could not recover compensation therefor.**" (Emphasis supplied.)

This decision was reviewed and adhered to in **Stebbins v. Georgia Veneer & Package Company,** 51 Ga. App. 56, 179 S. E. 649.

Blue Bell Globe Manufacturing Company v. Baird, 64 Ga. App. 347, 13 S. E. 2d 105, is to the same effect. The case had been before the Court previously, 61 Ga. App. 298, 6 S. E. 2d 83, and the injury sustained by Baird had been held not compensable by the Georgia Workmen's Compensation Board since "diminished earning capacity" did not result. Of its earlier decision the Court of Appeals of Georgia stated (p. 349):

> "This Court did not mean to imply that since there could be no compensation for such an injury a suit at common law would lie."

Moreover, under the holding in **Bartram v. City of Atlanta,** 71 Ga. App. 313, 30 S. E. 2d 780, an employer subject to the provisions of the Georgia Workmen's Act may not be sued by an employee for mental pain and suffering, although such is not compensable. We quote (p. 315):

> "It is contended by counsel for the plaintiff that since the provisions of the workmen's compensation act do not provide compensation for pain and suffering, under the petition in the instant case the provisions of the workmen's compensation law do not apply. This assignment is based on the contention that the legislature did not intend, in the passage of the workmen's compensation act to exclude a re-

covery in a case of negligence on the part of the employees, for mental pain and suffering."

* * * * * * *

"Therefore it follows that if the plaintiff in this case is entitled to compensation for the alleged injuries set forth in her petition, the Board of Workmen's Compensation has exclusive jurisdiction in the premises."

II.

The situation here presented is identical with that which moved the Court to grant certiorari and reverse the Ninth Circuit Court of Appeals in **Northern Pacific Railway Company v. Meese**, 239 U. S. 614. There this Court held:

"The highest court of the State having held, in construing the Washington Workmen's Compensation Act of 1911, that the compensation thereby provided in the cases covered by its terms was intended to be exclusive of every other remedy and that all causes of action theretofore existing and not saved by its provisos were done away with, the Federal Court should accept that construction."

Here, the Fifth Circuit Court of Appeals has overturned a District Court decision which reached a clearly permissible result in the application of Georgia law. This is contrary to decisions of this Court, other Circuit Courts of Appeal, and other Fifth Circuit decisions.

This Court, as to matters of state law, has said, **Brady v. Maryland**, 373 U. S. 83, 90

". . . state courts, state agencies, and state legislatures are its final expositors under our federal regime."

The District Judge in his opinion sustaining petitioner's motion to dismiss respondent's complaint (Appendix I)

followed the most recent decision of the Supreme Court of Georgia, **Southern Wire & Iron, Inc. v. Fowler**, 217 Ga. 727, 124 S. E. 2d 738, which contained the statement (p. 731):

> "The general rule in this country is not to allow common law actions against the employer for injuries brought about by a supervisory employee."

The Georgia statute, **Code Section** 114-103, itself is specific:

> "The rights and remedies herein granted to an employee . . . shall exclude all other rights and remedies of such employee . . . at common law or otherwise . . ."

Dismissal of respondent's complaint was, therefore, a clearly permissible result and should not have been overturned.

Luther v. Maple, 8 Cir., 250 F. 2d 916, 922;
Sudderth v. National Lead Company, 5 Cir., 272 F. 2d 259, 263;
Citizens Insurance Company v. Foxbilt, Inc., 8 Cir., 226 F. 2d 641.

Its overturn represents a departure from established principles of Federal Jurisprudence.

CONCLUSION.

It is obvious the Fifth Circuit Court of Appeals (as did the Ninth Circuit in **Northern Pacific Railway Company v. Meese**, 239 U. S. 614, supra), found itself in disagreement with the policy of the Georgia law denying respondent the right to sue and, being in disagreement, declined to follow it. As said in **Angel v. Bullington**, 330 U. S. 183, however

> "A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld."

And in **Ragan v. Merchants Transfer & Warehouse Co.**, 337 U. S. 530:

> "... in the present case we look to local law to find the cause of action on which suit is brought. Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defense in the federal court as in the state court."

This is a situation which can only be remedied by grant of certiorari.

Respectfully submitted.

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APPENDIX I.

In the United States District Court for the Northern District of Georgia, Atlanta Division.

Mrs. Lillian M. Skelton,

Plaintiff,

vs.

Civil Action. No. 8471.

W. T. Grant Company,

Defendant.

Order of Court.

(Filed in Clerk's Office Aug. 27, 1963.)

Defendant has filed a motion to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted because,

(a) Under the law of Georgia defendant is not liable to plaintiff for the acts alleged to have been committed by its employees; and,

(b) Plaintiff's right to maintain this action is foreclosed by the provisions of Georgia Code § 114-103.

The complaint alleges a willful slander and false imprisonment of plaintiff by a fellow servant and employee of defendant corporation. It is not specifically alleged that plaintiff was detained at the instance and direction of the corporate defendant, which is an essential to recovery for false imprisonment under Georgia law. **Smith v. Rich's, Inc.**, 104 Ga. App., 883, 885 (1961). Nevertheless it was alleged that the employee was acting within the scope of his employment so that evidence of authorization to act would be admissible.

Therefore, the motion to dismiss under Paragraph (a) must be overruled. See **Conley v. Gibson**, 355 U. S. 41, 47, 48 (1957).

However, the motion to dismiss upon the ground that Georgia Code § 114-103 (Workmen's Compensation Act) supersedes all common law rights of action (Paragraph b) is meritorious. See **Southern Wire & Iron, Inc. v. Fowler**, 217 Ga. 727 (1962).

Therefore, defendant's motion to dismiss will be granted upon receipt of an affidavit or stipulation to the effect that defendant corporation is under the provisions of the Workmen's Compensation Act; defendant to submit an appropriate Order.

This the 22nd day of August, 1963.

Frank A. Hooper,
Frank A. Hooper,
United States District Judge.

In the United States District Court for the Northern District of Georgia, Atlanta Division.

Mrs. Lillian M. Skelton,
vs.
W. T. Grant Company.
} Civil Action. No. 8471.

Order of Court.

Counsel for plaintiff has moved the Court to reconsider the Order of August 22, 1963, dismissing plaintiff's action upon the ground that plaintiff's alleged injuries would be compensable under the Georgia Workmen's Compensation law and therefore constitute a basis for recovery of damages in this Court.

The Order passed by this Court was passed after careful study of the decision by the Georgia Supreme Court in **Southern Wire & Iron, Inc. v. Fowler**, 217 Ga. 727, and the cases cited therein.

It must be readily conceded that at first blush it would not appear reasonable to assume that a false arrest of an employee by a fellow employee superior in rank would be compensable under the Workmen's Compensation Act, or could constitute an accident. This would seem to be particularly true where the false arrest did not result in any personal injuries and loss of time by the plaintiff, as Workmen's Compensation Acts are generally designed to cover physical impairment, lost wages, medical expenses and the like.

However, a careful reading of the above decision by the Georgia Supreme Court, and cases therein cited, lead to no other conclusion except the conclusion that the Act was designed to cover the situation involved herein. The Supreme Court expressly warned against contrary rulings being made on account of "the righteous indignation one feels against the actual person who deliberately injures another" (271 Ga. 730). The Court further stated:

> "The general rule in this country is not to allow common law actions against the employer for injuries brought about by a supervisory employee". (Practical reasons for such ruling are there stated, see p. 731.)

The Supreme Court of Georgia cited and approved the case of **McLaughlin v. Thompson, Boland & Lee, Inc.**, 72 Ga. App. 564, wherein Headnote 1 reads as follows:

> "Where an employee has accepted the workmen's compensation act as is therein provided, his rights against the employer to recover on account of injuries

sustained by reason of the breach of any duty arising out of the relation are determinable solely under the provisions of the act, and are not determinable at common law. Code § 114-103; Webb v. Tubise-Chatillon Corp., 45 Ga. App. 744 (165 S. E. 775); Stebbins v. Georgia Veneer & Pkg. Co., 51 Ga. App. 56 (179 S. E. 649)."

Headnote 3 reads as follows:

"Where a servant is injured by a fellow servant or superior employee in a dispute, not provoked by the injured servant, arising over the conduct of the master's business, the injury may be the result of an accident, in so far as the injured employee is concerned. Horwitz on Workmen's Compensation, p. 86. See the following cases in which it has been held that an assault by a third person may be an accident as to the injured employee. Pinkerton Agency v. Walker, 157 Ga. 548 (122 S. W. 202, 35 A. L. R. 557); Keen v. New Amsterdam Casualty Co., 34 Ga. App. 257 (129 S. E. 174).

It should be borne in mind that we are not here concerned with the right of this plaintiff to recover against her fellow employee, superior in rank to her. Nevertheless, plaintiff's injuries allegedly arose "on account of injury sustained by reason of the breach of (a) duty arising out of the relation" between the parties, and her rights are not determinable at common law.

Another approach to this matter would be a construction of claims not covered by workmen's compensation. The Supreme Court in the case above referred to cited the case of **Reid v. Lummus Cotton-Gin Company**, 58 Ga. App. 184, where on p. 185 there was enumerated the class of injuries caused by "accident." The quoted portion reads as follows:

"The word 'accident', as used in the act, includes every injury except diseases not naturally growing out of injuries arising out of and in the course of employment, injuries caused by the wilful act of a third person directed against such employee for reasons personal to him, and wilful misconduct on the part of the employee, and the act precludes action at common law or otherwise."

None of the exceptions apply in this case for plaintiff's injuries did not grow out of a disease, nor out of the willful act of another person growing out of personal reasons, nor to willful misconduct by the plaintiff. Plaintiff's injuries grew out of a willful act of a fellow employee arising upon a controversy based upon the business of the defendant employer.

For the above reasons the motion to reconsider is overruled.

This the 12th day of September, 1963.

Frank A. Hooper,
United States District Judge.

APPENDIX II.

Opinion of Court of Appeals.

In the
United States Court of Appeals
For the Fifth Circuit.

No. 20980.

Mrs. Lillian M. Skelton,
Appellant,

versus

W. T. Grant Company,
Appellee.

Appeal From the United States District Court for the Northern District of Georgia.

(April 14, 1964.)

Before Tuttle, Chief Judge, Wisdom, Circuit Judge, and Carswell, District Judge.

Tuttle, Chief Judge. This is an appeal from the dismissal by the trial court of an action for false arrest and illegal restraint brought in the state courts of Georgia, and removed to the federal court as a diversity case.

The basis of the trial court's order of dismissal was its conclusion that the Georgia Workmen's Compensation Statutes, as construed by the Supreme Court of the State

of Georgia, foreclosed any cause of action by an employee against his employer arising under the common law or from any statutory duty owed by the employer.

The complaint alleged that at the time of the alleged false arrest and illegal detention, the appellant, Mrs. Skelton, was an employee of W. T. Grant Company, and that she was summoned to the office of the credit manager who by closing the door and placing his chair against it, and, with two other supervisory employees, sitting in front of the door, restricted Mrs. Skelton's freedom of movement while they undertook to get her to sign a confession that she had stolen certain articles belonging to the store. It is alleged that they detained her for an hour and a half and loudly and persistently demanded that she sign the confession, following which, upon her persistent refusal to do so, she was released. She alleged that this conduct was apparent to others in the vicinity of the office and she was embarrassed and humiliated and thus damaged to the extent of $50,000, for which she brought the action. Her complaint did not allege that the conduct of the individual employees of the appellee in detaining her arose "out of and in the course of employment." She did allege that the appellee corporation was liable because the conduct of the employees in thus treating her was done by them in the course of their employment.

In support of its motion to dismiss in the court below, the appellee contended that the Georgia Workmen's Compensation Act denied to the appellant the right to maintain a suit at common law.[1]

---

[1] The applicable provisions of the Workmen's Compensation Laws of Georgia are as follows:

Georgia Code, Section 114-102:

"'Injury' and 'personal injury' defined.—'Injury' and 'personal injury' shall mean only injury by accident arising out of and in

In its order of dismissal, the trial court cited the Georgia Supreme Court case of **Southern Wire and Iron Company, Inc. v. Fowler,** 217 Ga. 727. That case dealt with a suit by an employee who had been required by a supervisory employee to work in connection with an acid vat alleged to be injurious to the person of the employee, which conduct the Georgia Supreme Court construed as being a failure to furnish the employee a safe place to work. The court there said: "The defendant's president, Borochoff, made no assault on the plaintiff. At most he wilfully failed to furnish the plaintiff a safe place to work. Regardless of the cause for his failure to provide a safe place to work, the result is the same, the employee's sole remedy against the employer, Southern Wire & Iron Company, was under the State Workmen's Compensation Act."

In the course of its opinion the Supreme Court stressed the fact that "under the provisions of Section 114-102, the employee's right to recover for an 'injury' or 'personal injury' is limited to an accident arising out of and

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the course of the employment and shall not, except as hereinafter provided, include a disease in any form except where it results naturally and unavoidably from the accident, nor shall 'injury' and 'personal injury' include injury caused by the wilful act of a third person directed against an employee for reasons personal to such employee, nor shall 'injury' and 'personal injury' include heart disease, heart attack, the failure or occlusion of any of the coronary blood vessels, or thrombosis, unless it is shown by preponderance of competent and creditable evidence that it was attributable to the performance of the usual work of employment."

Georgia Code Section 114-103:

"Other remedies excluded by this law.—The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this Title, agreeing respectively to accept and pay compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, at common law or otherwise, on account of such injury, loss of service or death."

in the course of the employment, and does not cover 'injury' caused by the wilful act of a third person." No case has been cited to us by the appellee for the proposition that the conduct here alleged to have been engaged in by the supervisory employees of the appellee would be compensable under the Workmen's Compensation Act of the State of Georgia.

As alleged in the case before us, Mrs. Skelton's unlawful detention, in order to obtain from her a confession that she had stolen some articles from the store, was in no way connected with the course of her employment or the performance of her duties for the company. If she had been a casual visitor at the store or a customer or had been present in the store for any other reason and had there done what the employees of Grant charged Mrs. Skelton with doing, there is nothing to show that they would not have dealt with her in precisely the same manner. In other words, there is nothing inherent in the relation of employer and employee that produced the treatment that is alleged to have been accorded to Mrs. Skelton. Moreover, in the absence of any Georgia authorities to the contrary, we conclude that this alleged conduct was "injury caused by the wilful act of a third person." In making such statement we, of course, do not rule on the extent to which such conduct might or might not bind the appellee under the principle of *respondeat superior*. This issue has not yet been presented to us for consideration.

In the absence of any decision by the highest courts of the State of Georgia, we can not construe the Workmen's Compensation Acts of that state as being designed to deprive an employee of any common law action which he might otherwise have against his employer, unless the action which he seeks to assert is one for an injury as to

which relief has actually been granted under the compensation laws. Thus, here, where it is not alleged, and there is nothing in the record to establish the fact, that the alleged illegal conduct, if it occurred, amounted to an "accident arising out of and in the course of employment," the action is not barred by anything provided for in the Workmen's Compensation Laws. It is noted that Section 114-103 (footnote *supra*) speaks of compensation on account of personal injury . . . by accident, and then provides that the provisions of the Act shall exclude all other rights and remedies of such employee "on account of **such** injury," (emphasis supplied) clearly meaning injury arising from accident. Here there was no accident and, to the contrary, there was alleged to be conduct which was wilfully and intentionally inflicted by a third person.

The judgment of the trial court dismissing the complaint is Reversed and the case is Remanded for further proceedings not inconsistent with this opinion.

United States Court of Appeals
For the Fifth Circuit.

October Term, 1963.

No. 20980.

D. C. Docket No. 8471 Civil.

Mrs. Lillian M. Skelton,

Appellant,

versus

W. T. Grant Company,

Appellee.

Appeal from the United States District Court
for the Northern District of Georgia.

Before Tuttle, Chief Judge, Wisdom, Circuit Judge, and Carswell, District Judge.

Judgment.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court:

It is further ordered and adjudged by this Court that the appellee, W. T. Grant Company, be condemned to

pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

April 14, 1964.

Issued as Mandate:

In the United States Court of Appeals
for the Fifth Circuit.

No. 20,980

Mrs. Lillian M. Skelton,
Appellant,

v.

W. T. Grant Company,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

(May 28, 1964.)

On Petition for Rehearing,

Before Tuttle, Chief Judge, Wisdom, Circuit Judge, and Carswell, District Judge.

Per Curiam:

It is Ordered that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby Denied.